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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

Robert Turinski and Tom Kosciolek,

Petitioners,

v.

Local 104 International Association of Fire Fighters; City of Wilkes-Barre; Thomas M. Leighton, Mayor, Individually and in his Official Capacity; Jacob Lisman, Fire Chief, Individually and as a Supervisor,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the rule announced by this Court in *Vaca v. Sipes* that an employee is excused from exhausting his administrative remedies when his union breaches its duty of fair representation by failing to process his grievance still viable?

2. Should two long-standing Firefighters of the City of Wilkes-Barre Fire Department, who risked their lives for almost 30 years, be given the opportunity for a jury trial since they produced evidence that the new, incoming Mayor forced them out of their contractually protected positions because they were political affiliated with the out-going Mayor?

3. Is it proper for the Court of Appeals to decide an issue that the trial court never addressed, or should the court have remanded since issues of credibility could only be decided by a jury?

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2. *Turinski/Kosciolek v. Local 104 International Association of Fire Fighters, et al.*, 06-5206 & 06-5208; Order affirming District Court Order dated March 12, 2008 by the Third Circuit Court of Appeals

3. *Turinski v. Local 104 International Association of Fire Fighters, et al.*, 04-1919, Order granting summary judgment to City of Wilkes-Barre and Local 104 dated December 18, 2006 by the United States District Court of the Middle District of Pennsylvania

4. *Kosciolek v. Local 104 International Association of Fire Fighters, et al.*, 04-1920, Order granting summary judgment to City of Wilkes-Barre and Local 104 dated December 18, 2006 by the United States District Court of the Middle District of Pennsylvania

Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit affirming the district court's decision that the Firefighters failed to exhaust their administrative remedies was entered on March 12, 2008. A Petition for Rehearing En Banc was denied on April 9, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

Statement of the Case

After a new Mayor for the City of Wilkes-Barre was elected in 2003, Mayor Thomas Leighton, two long-standing Firefighters, Robert Turinski, who was a 29-year veteran City Firefighter, and Tom Kosciolek, who was a 27-year veteran City Firefighter, were demoted and ultimately forced out of the City of Wilkes-Barre Fire Department. The Firefighters obtained their positions under the administration of the out-going Mayor, Mayor Thomas McGroarty.

Although Mayor Leighton knew that the Assistant Fire Chief positions were covered by the Collective Bargaining Agreement, he still made a decision to take the position away from the Firefighters. No Mayor, in the history of the City of Wilkes-Barre, has demoted Assistant Fire Chiefs except Mayor Leighton.

The newly elected Mayor stated in a letter to the Firefighters on November 26, 2003, " ... [t]his letter is to inform you that your position of Assistant Fire Chief is subject to the appointment by the Mayor of the City pursuant to the Wilkes Barre City Charter and Administrative Code. As such, your position will be open as of January 5, 2004. You are welcome to apply for this

open position, and you will be considered along with any other candidates. If you are interested in applying for the position ..." .

Mayor Leighton admitted that he did not have any performance problems with either of the Firefighters, and had no reason to demote the Firefighters when he came into office.

Mayor Leighton's newly appointed Fire Chief, Jacob Lisman, told the Firefighters that they were being demoted and that they should retire. Fire Chief Lisman specifically told Firefighter Turinski that he would lose a lot of money if he did not retire and it would look bad in the local newspaper if he got demoted.

The Firefighters filed a total of six (6) grievances over being verbally demoted and requested explanation as to why they were not given notice and a hearing. The Firefighters' Union President Thomas Makar, who accepted three (3) of the grievances from Firefighter Turinski, did nothing to help the Firefighters.

Union President Makar encouraged Firefighter Turinski to retire without telling him that he had applied for the very position Firefighter Turinski was losing. Union President Makar also told Firefighter Turinski that he would lose a lot of the money if he did not retire although at the same time he knew that the City could not demote the Firefighters because the Collective Bargaining Agreement (CBA) protected their positions.

Argument

I. This Petition meets the Court's standard of compelling reasons for review on a Writ of Certiorari

Petitioners respectfully request that this Court accept review of their petition for writ of certiorari to the Third Circuit Court of Appeals. The Third Circuit affirmed the district court's decision finding that the Firefighters failed to exhaust their administrative remedies yet the Firefighters alleged that the union breached their duty of fair representation in failing to address the six (6) grievances the Firefighters filed.

This Court has ruled that employees are excused from exhausting their administrative remedies if the union breaches its duty of fair representation. Therefore, the almost 30-year Veteran Firefighters should have been given the opportunity to present their case to a jury.

II. The lower courts erred by failing to follow this Court's decision in *Vaca*, which stated that employees are excused from exhausting their administrative remedies when their union breaches its duty of fair representation

As this Court noted in *Vaca*, where an employer breaches the agreement, and the union fails to remedy that breach by processing a grievance, than "[t]o leave the employee remediless in such circumstance would, in our opinion, be great injustice." *Vaca v. Sipes*, 386 U.S. 171, 185; 87 S. Ct. 903; 17 L. Ed. 2d 842 (1967). As this Court astutely noted Congress did not intend to "... shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements". *Id.* at 186.

Consequently, based on *Vaca*, the lower courts should have given the veteran Firefighters their day in court by finding that they were excused from the alleged failure to exhaust their administrative remedies since the Firefighters filed six (6) grievances only to be ignored by their own union, who's President, Thomas Makar, just happened, by coincident, to get one of the Firefighters' positions after they were forced out of the Fire Department even though they had risked their lives for the City of Wilkes-Barre for almost 30 years.

III. The Court of Appeals erred in concluding that the Firefighters did not present sufficient evidence of a claim for First Amendment Retaliation since they provided:

> **(1) a letter noting their positions were "open" by the newly elected Mayor, which was contrary to their rights in the CBA;**
>
> **(2) Firefighter Kosciolek told the newly elected Mayor that he could not stab the out-going Mayor McGroarty in the back by supporting him**

After finding that the trial court erred in finding that the Firefighters abandoned their claims of First Amendment Retaliation, instead of remanding for consideration of that claim, the Third Circuit concluded, *as a matter of law*, that the Firefighters did not present sufficient evidence to justify giving them having simply the opportunity to present their case to a jury. Besides erring in determining the merit's of the First Amendment claim, which was never analyzed by the trial court, the Appeals Court also erred by making jury determinations.

As this Court has noted "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986). "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson, supra.*

Since the First Amendment claims of Freedom of Association and Speech were surrounded by credibility determinations and weighing the evidence, the Third Circuit should have remanded to allow a jury to decide. A jury should have decided whether the City of Wilkes-Barre demoted and ultimately forced the Firefighters out of the Fire Department, which they belonged to for over 27 years, because of their political affiliation and speech associated with the out-going Mayor. The evidence in the record showed that the new mayor stated, in writing, that they no longer had their jobs the day he started office, and his political appointed Fire Chief told one of the Firefighters that he would lose a lot of money if he did not retire and be humiliated because he would receive bad newspaper coverage about being demoted.

IV. CONCLUSION

Because the newly elected Mayor forced the Firefighters, who had been with the Fire Department for almost three (3) decades, and their union did nothing about it although they had been due paying members for over 25 years, this Honorable Court should vacate the lower court's grant of summary judgment in the City's and Union's favor, and allow these veteran Firefighters to see the inside of a courtroom for a jury trial.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-5206 & 06-5208

ROBERT TURINSKI,

Appellant

v.

LOCAL 104 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS;
CITY OF WILKES-BARRE; THOMAS M. LEIGHTON, Mayor, Individually and in his Official Capacity; JACOB LISMAN, Fire Chief, Indidivually and as a Supervisor,

Appellees

THOMAS E. KOSCIOLEK,

Appellant

v.

LOCAL 104 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS; CITY OF WILKES-BARRE; THOMAS M. LEIGHTON, Mayor, Individually and in his Official Capacity; JACOB LISMAN, Fire Chief, Individually and as a Supervisor,

Appellees

SUR PETITION FOR REHARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges, and DITTER, * District Judge

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*Honorable J. William Ditter, Jr., District Judge for the Eastern District of Pennsylvania, sitting by designation vote is limited to panel rehearing only.

The Petition for Rehearing filed by the Appellants in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted fro rehearing, the Petition of Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,
/s/ Julio M. Fuentes
Circuit Judge

DATED: April 9, 2008
DMM/cc: Cynthia L. Pollick, Esq.
Stephen J. Holroyd, Esq.
John G. Dean, Esq.
Deborah H. Simon, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-5206 & 06-5208

ROBERT TURINSKI,
Appellant

v.

LOCAL 104 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS; CITY OF WILKES-BARRE; THOMAS M. LEIGHTON, Mayor, Individually and in his Official Capacity; JACOB LISMAN, Fire Chief, Individually and as a Supervisor,
Appellees

THOMAS E. KOSCIOLEK,
Appellant

v.

LOCAL 104 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS; CITY OF WILKES-BARRE; THOMAS M. LEIGHTON, Mayor, Individually and in his Official Capacity; JACOB LISMAN, Fire Chief, Individually and as a Supervisor,
Appellees

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Nos. 04-cv-01919, 04-cv-01920, 04-cv-01955 & 04-cv-01957)
District Judge: Honorable A. Richard Caputo

Argued January 8, 2008

Before: FUENTES and JORDAN, *Circuit Judges*, and DITTER,[1]* *District Judge*.

(Filed March 12, 2008)

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1 *Honorable J. William Ditter, Jr., District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

DITTER, *District Judge.*

Appellants Robert Turinski and Thomas Kosciolek appeal the District Court's grant of summary judgment dismissing their amended complaints.[2] The appellants' assert that they were constructively discharged from the Wilkes-Barre fire department when they were forced to choose between retirement or demotion without a hearing or notice of just cause. Because we conclude that the appellants failed to exhaust the due process procedure available to them and failed to properly plead and support their First Amendment claims we will affirm the judgment of the District Court.

I. Facts

We write for the parties and therefore provide only a brief summary of the facts. Robert Turinski began working for the City of Wilkes-Barre as a firefighter in 1975. He was hired as a private and was appointed to be

2 Turinski's appeal (06-5206) and Kosciolek's appeal (06-5208) were consolidated for all purposes on January 31, 2007.

an assistant chief in February of 2000 by Mayor Thomas McGroarty. Thomas Kosciolek was hired as a private in 1977, made captain in 2000, demoted back to private in 2001, and was appointed to be an assistant chief in 2002 by Mayor McGroarty. Appellants' employment with the city was governed by a collective bargaining agreement ("CBA") between the city and Local 104.

On November 26, 2003, Mayor-elect Thomas Leighton sent a letter to the appellants informing them that the assistant fire chief position was subject to mayoral appointment and that the position would be open as of January 5, 2004. The appellants were welcomed to apply for the open position, and they did so. In early February of 2004, the appellants spoke with Fire Chief Lisman, who had been recently appointed by Mayor Leighton. Chief Lisman informed appellants that they were not chosen to retain their positions as assistant chiefs (Appx. 511, 553) and that they could either retire or be demoted. (Appx. 518, 552.)

On February 11, 2004, Kosciolek filed three grievances. One sought "to find out why I am being demoted to private without a reason or hearing," and the other two addressed questions regarding his pension credits for military service and back pay. (Appx. 572-75.) On February 13, 2003, Turinski filed three grievances. The first stated: "I want to know why I am not being given a written notice to retire or be demoted to a private. I've been given a verbal on February 10, 2004 by Chief Lisman. I request a written notice." His second grievance stated "I want to know why I am being demoted to Private from Assistant Chief." Turinski's third grievance dealt with calculating back pay into his pension. (Appx. 535-37.)

On February 19, 2004, Chief Lisman wrote a response to these grievances to Local 104's president, Thomas Makar, and copied the appellants, stating "As of today, Thursday, February 19, 2004 at 0900 hours both Thomas Kosciolek and Robert Turinski are currently Assistant Chiefs in the Wilkes-Barre City Fire Department. Therefore, their grievances have no merit." (Appx. 576.)

On February 27, 2004, both Turinski and Kosciolek submitted letters announcing their retirement as of February 28, 2004. (Appx. 539, 577.) On July 22, 2004, Mayor Leighton promoted James Clarke and Thomas Makar to the vacant assistant chief positions.

At the time the District Court granted summary judgment, the claims remaining for consideration in Turinski's and Kosciolek's consolidated complaints included federal law claims brought pursuant to 42 U.S.C. § 1983 for: (1) violation of the Fourteenth Amendment because they were forced to retire without due process; (2) violation of the First Amendment for "political firing;" (3) violation of the First Amendment because they were retaliated against for free speech which "was a matter of public concern;" and (4) violation of the Fourth Amendment.[3] In addition, the appellants also had two state law claims, one for the breach of duty of fair representation against Local 104, and a second for breach of the collective bargaining agreement against the City.

The District Court granted judgment in favor of the defendants, holding that the appellants were not constructively discharged because they chose to retire. The Court also granted judgment in favor of the defendants on the First Amendment claim holding that Appellants

3 Appellants do not pursue their Fourth Amendment claim on appeal and the claim is therefore waived.

had failed to specify that claim and had waived it by not asserting it at summary judgment. The Court then declined to exercise supplemental jurisdiction over the remaining state law claims.

II. Due Process Claim

"[G]rievance procedures outlined in collective bargaining agreements can satisfy due process requirements." *Dykes v. SEPTA*, 68 F.3d 1564, 1572 (3d Cir. 1995). In *Dykes*, we held that even where the appellant alleged that his employer and the union conspired to deprive him of a fair hearing and of arbitration, the appellant had not asserted a cognizable violation of due process because he could have pursued his grievance to arbitration under the CBA and chose not to do so. *Id.*

Article XVI of the CBA between Wilkes-Barre and Local 104 describes the four- step grievance procedure which was available to Turinski and Kosciolek. An employee who feels aggrieved is instructed to: (1) discuss the matter orally with his immediate supervisor within five days of the occurrence giving rise to the grievance; (2) within five days of receiving an answer from the immediate supervisor, present his grievance in writing to the chief of the fire department who is to answer the grievance in writing within five days; (3) within five days of receiving the letter from the chief, either party may submit the grievance to the mayor; and (4) if the mayor fails to amicably resolve the grievance within ten days, either party may submit the matter to arbitration. (Appx. 600.)

Turinski and Kosciolek allege that the fire department, the mayor, and the union were working in concert to deprive them of their due process rights under

the CBA, which they assert forbids their demotion without just cause. Appellants, however, pursued their grievance only to the second step of the four-step process provided to them by the CBA: Turinski and Kosciolek filed written grievances through the union and they received a written response from Chief Lisman, their immediate supervisor, on February 19, 2006, denying their grievances concerning their alleged demotion for lack of merit because they had not been demoted and were still assistant chiefs.

Turinski acknowledged receiving Chief Lisman's response and admitted that he did not talk to any union representative or the mayor concerning the letter. (Appx. 518-19.) He further admitted that he did not ask the union to pursue the grievance. (Appx. 519-20.) Kosciolek similarly stated that he did not talk to anyone from the union after receiving Chief Lisman's letter denying his grievance and he never met with Mayor Leighton regarding the alleged demotion. (Appx. 558, 561-62.)

Even assuming that Turinski and Kosciolek had a property interest in their assistant chief positions, and assuming they were deprived of that interest when they "were forced to retire," they nonetheless failed to exhaust the grievance process available to them. Neither appellant took his grievance to the mayor, and even if they perceived this step as futile because they felt the mayor was behind their demotions, neither pursued the grievance to arbitration despite being entitled to do so under the CBA. Turinski and Kosciolek are thereby unable to prove a violation of § 1983 for violation of due process. *See Dykes*, 68 F.3d at 5172.

III. First Amendment Claim

Appellants argue on appeal that the District Court improperly granted summary judgment on their First Amendment claims because it did not address them in its opinions. Although we agree that the District Court did not properly reject appellants' First Amendment claims, we will nonetheless affirm its decision because the appellats failed to provide the facts necessary to survive defendants' motions for summary judgment.

The District Court's only reference to the matter was in a footnote where it said appellants had not specified how their rights were violated, and in any event, had abandoned their First Amendment claims by ignoring them at summary judgment. After a review of the record, we disagree with both assertions.

In Court III of their complaints, appellants alleged they had engaged in protected speech about the mayor's political ambitions and as a result, they were retaliated against by being threatened with demotion or retirement. Appellants' own summary judgment motion related only to due process and it was for that reason they did not mention their supporting briefs their First Amendment claims. However, appellants filed briefs opposing the motions of the city, Mayor Leighton, and the Chief Lisman for summary judgment and specifically argued their First Amendment claims. There was no abandonment.

Although the District Court was wrong in saying that appellants failed to specify how their First Amendment rights were violated and was wrong when it said the appellants ignored those claims at summary judgment, it was right in entering summary judgment against them.

Summary judgment is required against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Here, the appellants failed to provide any factual support for the First Amendment claims they pleaded and failed to properly plead the First Amendment claims they argued.

In order to have defeated the motion for summary judgment on their Free Speech claims, appellants had to show their speech was protected and was a substantial or motivating factor in their alleged demotion. Even assuming appellants' speech regarding "Mayor Leighton's political ambitions of forcing city employees to retire or be demoted" was protected, they offered no evidence that their speech was a motivating or substantial factor in the termination of their employment. Instead, appellants simply argue that because the second prong is a question of fact and not a question of law, summary judgment is inappropriate and appellants should be entitled to present their case to a jury.

Quite the contrary is true: summary judgment is required where a plaintiff fails to set forth specific facts supporting his claim. *United States v. 717 S. Woodward St.*, 2F.3d 529, 533 (3d Cir. 1993) (holding "the nonmoving party may not . . . rest[] on mere allegations or denials in the pleadings; rather, that party must set forth 'specific facts showing the there is a genuine issue for trial,' else summary judgment, 'if appropriate,' will be entered." (quoting Fed. R. Civ. P. 56(e))). Appellants" failure to show any facts causally linking their speech to their employer's adverse action is therefore fatal.

Appellants also argue that filing a grievance against the city may qualify as petitioning the government and note that they filed six grievances. However, appellants cannot succeed on a Petition Clause argument because they never pleaded that claim. In *Brennan v. Norton*, 350 F. 3d 399, 417 (3rd Cir. 2003), we held that where an appellant asserted a First Amendment claim based on the Speech and Association Clauses, he could not assert a Petition Clause claim in his brief opposing summary judgment. Just as in *Brennan*, the appellants' complaints here do not reference the Petition Clause, and instead only assert the First Amendment claims under the Free Speech Clause. *See also, Hill v. Kutztown*, 455 F.3d 225, 242 (3d Cir. 2006) (noting that although plaintiff's complaints might qualify as petitioning and constitute protected activity, he could not assert a petition claim because he had not alleged the defendant retaliated against him for those complaints).

Appellants note in their appellate brief that the District Court specifically mentioned their "First Amendment: Freedom of Association Claim" in its opinion denying the city's motion to dismiss their First Amendment claim. There, it appears the District Court generously construed Count II of the complaints filed against the city, Mayor Leighton, and Chief Lisman as a political association claim. Count II simply contained the phrase "Political Firing" in the title and stated that appellants' positions were not policy-making positions. However, in order to make out a political association claim, a public employee must allege"(1) that the employee works for a public employer in a position that does not require political affiliation, (2) that the employee maintained a political affiliation, (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." *Goodman*

v. Pennsylvania Turnpike Com'n, 293 F.3d 655, 663-64 (3d Cir. 2002). Appellants did not provide the District Court with facts showing that they maintained a political affiliation or that their affiliation was a substantial or motivating factor in their alleged constructive discharge in either their pleadings or their briefs for summary judgment.

The District Court's grant of summary judgment for defendants must therefore be affirmed.

IV. Conclusion

Because we find that the appellants failed to exhaust the due process available to them and failed to properly plead and support their First Amendment claims, we affirm the judgment of the District Court.

IN THE UNITED STAES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT TURINKSI	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 3:04-CV-1919
	:	
v.	:	
	:	(JUDGE CAPUTO)
WILKES-BARRE	:	
FIRE FIGHTERS	:	
ASSOCIATION	:	
LOCAL 104, et al.,	:	
	:	
	:	
Defendants.	:	
	:	
	:	

MEMORANDUM

Presently before the Court are cross-motions for summary judgment filed by Plaintiff Robert Turinski ("Plaintiff") and Defendants City of Wilkes-Barre (the "City"), Thomas M. Leighton ("Mayor Leighton"), Jacob Lisman ("Chief Lisman") (collectively "City Defendants"), and Wilkes-Barre Fire Fighters Local 104, International Association of Fire Fighters, AFL-CIO ("Local 104") (collectively "Defendants"). (Docs. 72, 75, 80 and 85.) For the reasons stated below, Plaintiff's motions will be denied. Defendants' motions will be granted as to Count I of Plaintiff's Second Amended Complaint. The Court has jurisdiction over Count I of Plaintiff's Second Amended Complaint pursuant to 28 U.S.C. § 1331. The Court will decline to exercise its supplemental jurisdiction, pursuant

to 28 U.S.C. § 1367, over Counts II and III of Plaintiff's Second Amended Complaint, and will dismiss these claims without prejudice.

BACKGROUND

I. Factual Background

While the Court is presented with cross-motions for summary judgment, because the Court will grant summary judgment in Defendants' favor, the Court will accept Plaintiff's version of the facts and view them in the light most favorable to him.

Plaintiff was hired as a firefighter by the City in 1975. (Turinski Dep. 10:21, Aug. 17, 2006, Doc. 79-2.) Ninety (90) days after his hiring, Plaintiff became a member of Local 104, the union that represents the City firefighters. (Turinski Dep. 13:12-22.) Plaintiff was employed at the rank of private from 1975 until 2000. (Turinksi Dep. 11:24-25; 17:15-22.) In 2000, Plaintiff was appointed an Assistant Fire Chief by Mayor Thomas McGroarty. (Turinski Dep. 42:1-2.)

In 2003, the office of Mayor of the City was up for election. (Turinski Dep. 45:22-24.) The incumbent Mayor McGroarty faced off against Thomas M. Leighton, now the Mayor of the City. (See Turinski Dep. 46: 9-11.) At first, during the primary election season, which occurred in the Spring of 2003, Plaintiff placed his allegiance with the incumbent McGroarty, with whom Plaintiff was "good friends." (Turinski Dep. 49:6-8; 54:20.) Plaintiff contributed financial support and attended McGroarty's campaign social functions. (Turinski Dep. 49:20-50:12.) Plaintiff also supported McGroarty more vocally, asking people to vote for McGroarty and attending rallies. (Turinski Dep. 54:17-55:7.)

However, Plaintiff began to hear rumors that, if Leighton were elected Mayor, there would be a "shake-up in the fire department." (Turinski Dep. 47:12-14.) In particular, Plaintiff heard that Leighton would appoint Jacob Lisman as Fire Chief, and that there would be changes made among the ranks of the Assistant Chiefs. (Turinski Dep. 58:7.) Plaintiff began to fear for his job. (Turinksi Dep. 50:17.) Consequently, Plaintiff decided to switch his support from McGroarty to Leighton. (Turinski Dep. 50:13-17.) Plaintiff contributed money, attended campaign functions conducted on Leighton's behalf, and placed yard signs in his yard. (Turinski Dep. 51:8-15; 75:21.) Leighton beat McGroarty in the primary and then won the general election. (See Turinski Dep. 72:20-23; Local 104's Statement of Material Facts ¶ 10, Doc. 82.)

Thereafter, on November 26, 2003, Plaintiff and other Assistant Fire Chiefs received a letter from then Mayor-Elect Leighton. (Turinski Dep. 72: 16-25.) In the letter, Leighton informed Plaintiff and the other Assistant Fire Chiefs that their positions were subject to appointment by the Mayor. (Letter from Thomas M. Leighton, Mayor, City of Wilkes-Barre, to Robert S. Turinski, dated November 26, 2003, Doc. 95-4, "Leighton Letter".) As such, Leighton stated that he was opening their positions to other candidates. (Id.) Leighton did, however, invite Plaintiff and the other Assistant Fire Chiefs to apply for their positions. (Id.)

Plaintiff accepted Leighton's invitation to apply for an Assistant Fire Chief position. (Turinski Dep. 73:5.) Plaintiff submitted a resume and was interviewed by the Mayor's transition team. (Turinski Dep. 77:3-8.) One of the persons who interviewed Plaintiff was Jacob Lisman, who, as rumored, was appointed Fire Chief by

Mayor Leighton. (Turinski Dep. 84:25-85:3.) During the interview process, Plaintiff continued to act as and was paid as an Assistant Fire Chief. (Turinski Dep. 85:6-85:11.)

Then, on the afternoon of February 10, 2004, Chief Lisman called Plaintiff into his office and informed him that Mayor Leighton would not be selecting him to serve as an Assistant Fire Chief in his administration. (Turinski Dep. 86:12-16.) Plaintiff asked Lisman why he would not be selected, and Lisman responded that he had nothing to do with the decision. (Turinksi Dep. 93:19-20.) Chief Lisman told Plaintiff that he had two choices --- "retire or get demoted to private." (Turinski Dep. 85:16-17.) Chief Lisman even offered to type up a letter of resignation for Plaintiff to sign, which Plaintiff refused to do, telling Lisman that he did not want to retire. (Turinski Dep. 89:9-13.)

Afterwards, on February 11, 2004, or February 12, 2004, Plaintiff called two councilmembers for the City, Phil Latinski and Shirley Vitanovec, in an effort to save his job as an Assistant Fire Chief. (Turinski Dep. 92:10; 96:14.) Both Latinski and Vitanovec informed Plaintiff that Mayor Leighton had told them that "it was the transition team" that did not select Plaintiff. (Turinski Dep. 94:11-12; 96:25-97:1.)

Plaintiff then spoke with Tim Evans, a member of the Mayor's transition team, who told Plaintiff that he "thought [Plaintiff] did good and that [he] [was] going to be selected for assistant chief." (Turinski Dep. 96:4-6.) As such, Plaintiff believes that his being forced to retire was the doing of Mayor Leighton.

On February 13, 2004, Plaintiff went to his Local 104 union representative, Thomas Makar, who also was president of the union (Turinski Dep. 110:4), and filed three grievances (Turinski Dep. 90:4-15). Plaintiff's first grievance was based upon his being demoted from Assistant Fire Chief to private. (Turinski Dep. 90:10-11.) Second, Plaintiff grieved that he was not provided with any documentation verifying his demotion. (Turinski Dep. 90:11-13.) Third, Plaintiff complained that his back pay had not been included in determining his pension. (Turinski Dep. 90:13-15.) This third grievance, Plaintiff concedes, had nothing to do with his allegedly being forced to retire or accept a demotion from the position of Assistant Fire Chief. (Turinski Dep. 143:2-3.) Makar told Plaintiff that, if Plaintiff did not retire and was demoted to private, he would lose a lot of money from his pension, which is calculated based upon a firefighter's final salary. (Turinski Dep. 90:16-21; 122:11-128:8; 129:25-130:2.)

Afterwards, Plaintiff again spoke with Chief Lisman, who asked Plaintiff whether he has made a decision yet. (Turinski Dep. 97:12-13.) Plaintiff responded that he did not have an answer yet. (Turinski Dep. 97:14-15.) Lisman then told Plaintiff that he would have a job "down at South Station on Engine 5 either as a driver or a hoseman." (Turinski Dep. 97:18-20.) However, Plaintiff testified that Lisman specifically informed him that Plaintiff was not demoted yet. (Turinski Dep. 97:22-25.)

On February 19, 2004, Chief Lisman responded to Plaintiff's grievances pertaining to his impending demotion, rejecting them because, as of that date, Plaintiff was still an Assistant Fire Chief. (Turinski Dep. 98:1-10; 116:11-17; see Letter from Jacob Lisman, Fire Chief, City of Wilkes-Barre, to Thomas Makar, President of Local 104, dated February 19, 2004, Doc. 87-12, "Lisman

Letter".) Plaintiff, however, argues that his grievance was not fully pursued by Local 104 because Thomas Makar, President of Local 104, was interested in becoming an Assistant Fire Chief, and knew that positions would become available due to Plaintiff and others being forced to retire. (Turinski Dep. 144:12-145:21.) Makar, in fact, was appointed Assistant Fire Chief by Mayor Leighton after Plaintiff was forced to retire. (Turinski Dep. 118:19-119:13.)

Plaintiff also tried to contact Mayor Leighton, but, despite his frequent phone calls, Plaintiff could not get through to speak with Leighton and Leighton did not return Plaintiff's calls until after Plaintiff had retired. (Turinski Dep. 123:14-23.)

On February 27, 2004, Plaintiff signed and delivered a letter expressing his intent to retire from the Fire Department, effective February 28, 2004. (Turinski Dep. 129:8-10; Letter from Robert S. Turinski, dated February 27, 2004, Doc. 87-13, "Retirement Letter".) Up until Plaintiff's retirement, Plaitniff maintained the rank of and was paid the salary of an Assistant Fire Chief. (Turinski Dep. 130:8-9.) Plaintiff chose to retire, rather than accept a demotion to private, because his pension, which is calculated based upon his salary, would have been reduced had he been demoted to the lower-paying position. (Turinski Dep. 150:14-15.)

Plaintiff's employment as Assistant Fire Chief with the City was governed by the Collective Bargaining Agreement ("CBA") between Local 104 and the City. (Doc. 87-14;Turinski Dep. 143:18-21.) Plaintiff avers that, under the CBA, he can only be fired for "just cause." (Turinski Dep. 158:1; see Article 27 of the CBA, Doc. 87-14 at 30.)

II. Procedural Background

On August 27, 2004, Plaintiff filed his Complaint (Doc. 1.) Plaintiff then filed anAmended Complaint on September 2, 2004. (Doc. 2.) Thereafter, on September 22, 2004, Plaintiff filed a motion for leave to file a second amended complaint (Doc. 5.), whichthe Court later granted (Doc. 40.) Plaintiff's Second Amended Complaint was filed on December 16, 2004. (Doc. 42.) Therein, Plaintiff alleged that Defendants deprived him of his constitutional rights[1] under color of state law, in violation of 42 U.S.C. §§ 1983, 1985 and 1986, by forcing him to retire (i.e., a "constructive discharge"). (Doc. 42 ¶¶ 6-23.) Plaintiff also asserted a claim against Local 104 for the breach of its duty, as his union, of fair representation. (Doc. 42 ¶¶ 24-25.) Lastly, Plaintiff claimed that the City breached multiple provisions of the CBA. (Doc. 42 ¶¶ 26-31.)

Local 104 and City Defendants each moved to dismiss Plaintiff's Second Amended Complaint. (Docs. 34, 37.) On August 9, 2005, the Court granted Defendants' motion to the extent that Plaintiff's section 1985 and 1986 claims were dismissed for failure to state a claim. (Doc. 50.) City Defendants then filed a second motion to dismiss. (Doc. 51.) On August 16, 2005, the Court granted City Defendants' motion to dismiss insofar as they sought dismissal of Plaintiff's claims against Mayor Leighton

1 1Plaintiff's Second Amended Complaint cites the First, Fourth and Fourteenth Amendments. (Doc.42 ¶ 1.) However, Plaintiff fails to specify how his First or Fourth Amendment rights were violated. Rather, Plaintiff focuses entirely on the lack of cause, or a hearing, for his alleged constructive discharge. Indeed, Plaintiff's Brief in Support of his Motion for Summary Judgment against CityDefendants only addresses procedural due process. (Doc. 73 at 18.) As such, the Court construesPlaintiff's Second Amended Complaint as only claiming a violation of procedural due process. Evenif Plaintiff did raise these claims in his Second Amended Complaint, because he ignored them at summary judgment, they are deemed waived. Scott v. Beard, Civil Action No. 3:02-CV-0691, 2006WL 2645150, at *4 (M.D. Pa. Sept. 14, 2006).

and Chief Lisman in their official capacities. (Doc. 57.)

On September 19, 2006, Plaintiff moved for summary judgment against both Local 104 and City Defendants. (Docs. 72, 75.) Thereafter, on September 20, 2006, Local 104 filed a Motion for Summary Judgment. (Doc. 80-1.) On October 2, 2006, City Defendants moved the Court for summary judgment as to Plaintiff's claims. (Docs. 85-1.)

These motions are fully briefed and ripe for disposition.

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party in entitled to a judgment as a matte of law." FED. R. CIV. P. 56(c). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. See id. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." Id.

Where there is material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is

entitled to judgment as a matter of law. See CHARLES ALAN WRIGHT & ARHTUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficient showing of an essential element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. See *White v. Westinghouse Elec. Co.*, 862 F.2d 56,59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. See *Anderson*, 477 U.S. at 256-257.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

DISCUSSION

I. Plaintiff's Procedural Due Process Claim

To establish a claim under section 1983 for deprivation of procedural due process, a plaintiff must prove that he was deprived of a property interest under the color of state law and the procedures available to him did not provide him with due process. *Dykes v.Southeastern Pa. Transp. Auth.*, 68 F.3d. 1564, 1570 (3d Cir. 1995). Here, Plaintiff bases his procedural due to process claim upon his alleged constructive discharge.

Employee resignations and retirements are presumed to be voluntary. Lehany v.City of Pittsburgh, 183 F.3d 220, 228 (3d Cir. 1999) (citing *Anagarita v. St. Louis County*, 981 F.2d 1537, 1544 (8th Cir. 1992)). "This presumption remains intact until the employee presents evidence to establish that the resignation or retirement was involuntarily procured." Id. "If an employee retires of his own free will, even though prompted to do so by some action of his employer, he is deemed to have relinquished his property interest in his continued employment for the government, and cannot contend that he was deprived of his due process rights." Id. (citing *Hargray v. City of Hallandale*, 57 F.3d 1560, 1567 (11th Cir. 1995); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 173 (4th Cir. 1988)).

Under Third Circuit jurisprudence, "a resignation will be deemed involuntary (i.e., deemed a constructive discharge) and will thus trigger the protections of the due process clause, and form the basis of a [section] 1983 due process claim, under only two circumstances: (1) when the employer forces the employee's resignation or retirement by coercion or duress, or (2) when the employer

obtains the resignation or retirement by deceiving or misrepresenting a material fact to the employee." *Hill v. Borough of Kutztown*, 455 F.3d 225, 233 n.10 (3d Cir. 2006) (citing *Lehany*, 183 F.3d at 228). To determine whether a retirement is involuntary, the Court must look at all of the circumstances surrounding Plaintiff's retirement. *O'Connell v. County of Northampton*, 79 F.Supp. 2d 529, 533 (E.D. Pa. 1999). The issue is whether Plaintiff reasonably believed that he "had no other choice but to quit." *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1222 (10th Cir. 2000); see also *Pa. State Police v. Suders*, 542 U.s. 129, 134 (2004). "[T]he assessment [of] whether real alternatives were offered is gauged by an objective standard rather than by the employee's purely subjective evaluation; that the employee may perceive his only option to be resignation...is irrelevant." *Stone*, 855 F.2d at 174; see *Christie v. United States*, 518 F.2d 584, 587-88 (Ct. Cl. 1975). "[T]he mere fact that the choice is between two comparably unpleasant alternatives...does not itself establish that a resignation was induced by duress or coercion, hence was involuntary." *Stone*, 855 F.2d at 174. This is so because the fact remains that a plaintiff faced with uninviting alternatives still has a choice. *Christie*, 518 F.2d at 587-88.

Here, Plaintiff has made no allegations and has introduced no evidence that City Defendants deceived or misrepresented a material fact to him, inducing him to retire. Rather, Plaintiff claims only that his retirement was the product of coercion or duress.

In determining whether a retirement was involuntary due to coercion or duress, the Court id to consider the following factors (1) whether the employee was presented with an alternative to retirement; (2) whether the employee understood the nature of the choice

he was given; (3) whether the employee had a reasonable time to choose; (4) whether the employee was permitted to select the effective date of retirement; and (5) whether the employee had the advice of counsel. *Hargray*, 57 F.3d at 1568; *Speziale v. Bethlehem Area Sch. Dist.*, 266 F. Supp. 2d 366, 372 (E.D. Pa. 2003); O'Connell, 79 F. Supp. 2d at 533. After analyzing these factors, the Court concludes that Plaintiff has failed to raise a genuine issue of material fact as to whether his retirement was the product of coercion or duress, and thus involuntarily procured. As such, the Court will grant summary judgment in Defendants' favor.

First, while Plaintiff argues that Defendants forced his hand, Plaintiff was presented with an alternative to retirement, albeit an unpleasant one – Plaintiff could have accepted a demotion from Assistant Fire Chief to private. Consequently, Plaintiff's retirement was voluntary. *Ballentine v. Dep't of Justice*, 884 F.2d 1399 (Fed. Cir. 1989) (Table)(per curiam), available at 1989 WL 90751 (retirement was voluntary where employee was presented with choice of either retiring or accepting a demotion) (citing *Christie*, 518 F.2d at 587); *Filliben v. Dep't of Navy*, 34 M.S.P.R. 31, 34 (1987) (choice between demotion and resignation does not render a resignation involuntary).[2]

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2 It appears that Plaintiff even possessed a third option – Plaintiff could have stood pat. Mayor Leighton did not appoint Plaintiff's replacement until July 22, 2004, nearly five months after Plaintiff's retirement. (Makar Dep. 65:7-10; City of Wilkes-Barre Office of the Mayor, Executive Order No. 47 of 2004, dated July 22, 2004, Doc 80-15.) As such, Plaintiff may have been able to remain as Assistant Fire Chief until that time. Plaintiff could have at least remained as an Assistant Fire Chief past the date of his retirement. Plaintiff could have waited for his demotion to private, a demotion he alleges was sure to come, and then prosecute a grievance with Local 140 under the CBA. However, Plaintiff decided against this option, instead choosing to preempt his allegedly impending demotion by retiring.

Second, Plaintiff understood the nature of the choice put to him. The record demonstrates that Plaintiff was keenly aware of his options, as well as their potential ramifications. Plaintiff knew that, if he chose to retire, he would do so at a higher pension because his pension would be based upon his Assistant Fire Chief's salary. Plaintiff also knew that, if he were ultimately demoted to the lower-paying position of private, his pension would be based upon the reduced level of pay. Plaintiff chose to retire in order to protect his higher pension. Consequently, the Court concludes that Plaintiff understood the nature of the choice put to him as well as the ramifications of his decision to retire.

Third, Plaintiff had a reasonable period of time in which to decide whether to retire. The Leighton Letter was dated November 26, 2003. Plaintiff's Retirement Letter was dated February 27, 2004. In addition, Plaintiff had heard rumors about Mayor Leighton's intent to shake up the Fire Department during the Spring of 2003. As such, Plaintiff had more than three months to consider his decision. While Plaintiff stated in his deposition that Chief Lisman pressured him to retire during their February 10, 2004 conversation, with Lisman even offering to type up a letter of retirement for Plaintiff to sign, Plaintiff did not succumb to Lisman's pressure. Afterwards, Plaintiff even filed grievances with Local 104 and waited for their resolution. After receiving an answer from the City on February 19, 2004 that his grievance was without merit because he still occupied the position of Assistant Fire Chief, Plaintiff waited more than a week before submitting his Retirement Letter on February 27, 2004. Viewing all of these surrounding circumstances, the Court concludes that Plaintiff had a reasonable period of time in which to make an informed decision to retire.

Fourth, Plaintiff had control over the effective date of his retirement. There is no evidence in the record suggesting that Plaintiff was given a deadline to make his decision. To be sure, Mayor Leighton did not appoint Plaintiff's replacement until July 22, 2004, nearly five months after Plaintiff's retirement. (Maker Dep. 65:7-10; City of Wilkes-Barre Office of the Mayor, Executive Order No. 47 of 2004, dated July 22, 2004, Doc. 80-15.) As such, it appears that Plaintiff could have remained in his position as Assistant Fire Chief until that time. At the least, Plaintiff could have remained in his position as Assistant Fire Chief past February 28, 2004. waited for his allegedly impending demotion, and then challenged it through the union grievance procedure. Instead, Plaintiff chose to retire, effective February 28, 2004. As such, the Court concludes that Plaintiff controlled the effective date of his retirement.

Lastly, Plaintiff does not appear to have had the advice of counsel. However, Plaintiff has failed to present any evidence of how the advice of counsel would have altered his decision to retire. As such, this factor does not weigh in Plaintiff's favor. See *Speziale*, 266 F. Supp. 2d at 374.

Having fully addressed the five factor test set forth in *Hargray* and employed in *O'Connell and Speziale*, the Court concludes that there is no genuine issue of material fact as to whether Plaintiff's retirement was the product of coercion or duress on the part of Defendants. Even when viewing the evidence in the light most favorable to Plaintiff, the court finds that Plaintiff was presented with at least two options – accept a demotion to private or retire. "Resignations obtained in cases where an employee is faced with unpleasant alternatives are nevertheless voluntary because "the fact remains that plaintiff had a

choice." *Hargray*, 57 F.3d at 1568 (quoting *Christie*, 518 F.2d at 587). Here, Plaintiff has failed to present evidence that his choice between these two unpleasant alternatives was not, in fact, a choice. He has therefore failed to rebut the presumption that his retirement was voluntary. Defendants are thus entitled to summary judgment on Plaintiff's section 1983 constructive discharge claim.[3] Plaintiff's motions for summary judgment will be denied.

II. Plaintiff's State Law Claims

Whereas Plaintiff's now dismissed federal law claims were the bases for subject matter jurisdiction, the Court will decline to exercise supplemental jurisdiction over Plaintiff's state law claims against Local 104 for breach pf a union's duty of fair representation and breach of contract. 28 U.S.C. § 1367(c) (a federal district court

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3 Because the Court concludes that Plaintiff voluntarily relinquished any property interest in his public employment, the Court need not address in depth the issue of whether the grievance procedures available to him provided him with due process of law. The Court notes that the United Sate Court of Appeals for the Third Circuit has repeatedly held that, "in cases in which 'a due process claim is raised against a public employer, and grievance and arbitration procedures are in place,...those procedures satisfy due process requirements.'" Leheny, 183 F.3d at 228. In the present case, Plaintiff's employment was governed by the CBA between Local 104 and the City. The CBA included a grievance procedure providing for successive appeals to higher levels within the Fire Department, then to the Mayor, and ultimately to an arbitrator. (Article 16 of the CBA, Doc. 87-14 at 17-18.) Such a process has been held to meet the requisite due process requirements in a public employment context. Jackson v. Temple Univ., 721 F.2d 931, 933 (3d Cir. 1983). (stating that right to proceed to arbitration satisfies due process even if earlier grievance hearing were inherently biased). Plaintiff did, in fact, file a grievance via those procedures, which was subsequently denied by Chief Lisman because Plaintiff had not yet been demoted. Plaintiff then abandoned his grievance, having not grieved to the Mayor, which was the next step in the CBA grievance procedure. Also, the CBA grievance procedure remained available to Plaintiff to challenge his demotion if and when he ultimately were demoted. However, Plaintiff chose to retire rather than stand pat, wait for the demotion he alleges was a foregone conclusion, and fight. Having not availed himself of the constitutionality adequate process that was available to him under the CBA, Plaintiff could not now complain that he was deprived of due process.

may decline to exercise supplemental jurisdiction over state law claims when the court had dismissed all claims over which it has original jurisdiction); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (stating that "if the federal claims are dismissed before trial...the state claims should be dismissed as well"). Accordingly, the Court will dismiss Counts II and III of Plaintiff's Second Amended Complaint without prejudice.

CONCLUSION

For the above stated reasons, the Court will: (1) grant Defendants' motions for summary judgment as to Count I of Plaintiff's Second Amended Complaint; (2) dismiss Counts II and III of Plaintiff's Second Amended Complaint without prejudice; and (3) deny Plaintiff's motions for summary judgment.

An appropriate Order will follow.

December 18, 2006
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT TURINSKI,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	3:04-CV-1919
	:	
v.	:	
	:	(JUDGE CAPUTO)
WILKES-BARRE	:	
FIRE FIGHTERS	:	
ASSOCIATION LOCAL 104,	:	
INTERNATIONAL	:	
ASSOCIATION OF FIRE	:	
FIGHTERS, AFL-CIO	:	
a/k/a LOCAL 104 OF THE	:	
INTERNATIONAL	:	
ASSOCAITION OF FIRE	:	
FIGHTERS, AFL-CIO-CLC	:	
and CITY OF	:	
WILKES-BARRE,	:	
	:	
Defendants,	:	

ORDER

NOW, this 18TH day of December, 2006, **IT IS HEREBY ORDERED** THAT:

(1) Defendants City of Wilkes-Barre, Thomas M. Leighton, Jacob Lisman, and Wilkes-Barre Fire Fighters Local 104, International Association of Fire Fighters, AFL-CIO's Motions for Summary Judgment (Docs. 80, 85) as to Count I of Plaintiff's Second Amended Complaint (Doc. 42) are **GRANTED**.

(2) Plaintiff's Motions for Partial Summary Judgment (Docs. 72, 75) are **DENIED**.

(3) Counts II and III of Plaintiff's Second Amended Complaint (Doc. 42) are **DISMISSED** without prejudice.

(4) The Clerk of the Court shall mark this case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNTIED STATES DISITRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS E. KOSCIOLEK,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 3:04-CV-1920
	:	
v.	:	
	:	(JUDGE CAPUTO)
WILKES-BARRE	:	
FIRE FIGHTERS	:	
ASSOCATION	:	
LOCAL 104, et al.,	:	
	:	
Defendants	:	
	:	

MEMORANDUM

Presently before the Court are cross-motions for summary judgment filed by Plaintiff Thomas E. Kosciolek ("Plaintiff") and Defendants City of Wilkes-Barre (the "City"), Thomas M. Leighton ("Mayor Leighton"), Jacob Lisman ("Chief Lisman") (collectively "City Defendants"), and Wilkes-Bare Fire Fighters Local 104, International Association of Fire Fighters, AFL_CIO ("Local 104") (collectively "Defendants"). (Docs. 61, 64, 71 and 76.) For the reasons stated below, Plaintiff's motions will be denied. Defendants' motions will be granted as to Count I of Plaintiff's Amended Complaint. The Court has jurisdiction over Count I of Plaintiff's Amended Complaint pursuant to 28 U.S.C. § 1331. The Court will decline to exercise its supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Counts II and III of Plaintiff's Amended Complaint, and will dismiss these claims with prejudice.

BACKGROUND

I. Factual Background

While the Court is presented with cross-motions for summary judgment, because the Court will grant summary judgment in Defendants' favor, the Court will accept Plaintiff's version of the facts and view them in the light most favorable to him.

Plaintiff was hired as a firefighter by the City in 1977. (Kosciolek Dep. 9:21, Aug. 17, 2006, Doc. 70.) Ninety (90) days after his hiring, Plaintiff became a member of Local 104, the union that represents the City firefighters. (Kosciolek Dep. 73:23-25.) Plaintiff was employed at the rank of private from 1977 until 2000. (Kosciolek Dep. 11:11.) In 2000, after having sought a promotion on multiple occasions, Plaintiff was elevated to the rank of Captain. (Kosciolek Dep. 14:19-17:17.) However, in 2001, Plaintiff was demoted back to private after Local 104 filed a grievance over his promotion. (Kosciolek Dep. 21:9-22:1.) Then, in 2002, Plaintiff was appointed to the rank of Assistant Fire Chief by Thomas McGroarty, then the Mayor of the City. (Kosciolek Dep. 17:25; 25:25-26:2.)

In 2003, the office of Mayor of the City was up for election. (See Kosciolek Dep. 31:23-25; 32:17-20.) The incumbent Mayor McGroarty was challenged by Thomas M. Leighton, the current Mayor of the City. (See Kosciolek Dep. 31:23-25; 32:17-33:5.) Prior to the Spring Primary, Plaintiff heard rumors floating around the firehouses that, if Leighton were elected Mayor, the Fire Chief and Assistant Fire Chiefs "were going to be demoted and thrown out." (Kosciolek Dep. 33:3.) Hence, despite Mayor McGroarty's appointment of Plaintiff to Assistant Fire Chief, as well as the allegiance Plaintiff felt toward

McGroarty because of this, Plaintiff purchased tickets for and attended a Leighton campaign function to show that, if Leighton were elected Mayor, Plaintiff would support him. (Kosciolek Dep. 32:4-16; 34:6-12.) Leighton beat McGroarty in the primary and then won the general election. (See Kosciolek Dep. 35:2-14.)

On November 26, 2003, Plaintiff and other Assistant Fire Chiefs received a letter from then Mayor-Elect Leighton. (Kosciolek Dep. 41:17-18.) In the letter, Leighton informed Plaintiff and the other Assistant Fire Chiefs that their positions were subject to appointment by the Mayor. (Letter from Thomas M. Leighton, Mayor, City of Wilkes-Barre, to Thomas E. Kosciolek, dated November 26, 2003, Doc. 78-9, "Leighton Letter".) As such, Leighton stated that he was opening their positions to other candidates. (Id.) Leighton did, however, invite Plaintiff and the other Assistant Fire Chiefs to apply for their positions. (Id.)

Plaintiff accepted Leighton's invitation to apply for the position of Assistant Fire Chief. (Kosciolek Dep. 41:24-42:1; 44:7-8.) Plaintiff submitted a resume (Kosciolek Dep. 44:25-47:15.) and was interviewed in January of 2004. (Kosciolek Dep. 44:25-47:15.) During the interview process, Plaintiff continued to act as and was paid as an Assistant Fire Chief. (Kosciolek Dep. 45:18-22.)

Then, in February of 2004, Chief Lisman called Plaintiff into his office (Kosciolek Dep. 48:24-25) and told him that he had "some bad news for you. You weren't picked by the [mayoral] transition team. So you're either going to be demoted or retire." (Kosciolek Dep. 49:2-4.) Chief Lisman even offered to type up a retirement letter for Plaintiff. (Kosciolek Dep. 110:2-4.)

On February 11, 2004, Plaintiff filed a grievance with his Local 104 union representative, Michael Bilski, demanding to know why he was "being demoted to private without a reason or a hearing." (Kosciolek Dep. 54:15-18; 81-25.) Plaintiff also filed a second grievance based upon the calculation of his pension. (Kosciolek Dep. 55:7-12.)

On February 19, 2004, Chief Lisman responded to Plaintiff's grievances pertaining to his impending demotion, rejecting it because, as of that date, Plaintiff was still an Assistant Fire Chief. (Letter from Jacob Lisman, Fire Chief, City of Wilkes-Barre, to Thomas Makar, President of Local 104, dated February 19, 2004, Doc. 78-11, "Lisman Letter".) Plaintiff, however, argues that his grievance was not fully pursued by Local 104 because Thomas Makar, President of Local 104, was interested in becoming an Assistant Fire Chief, and knew that positions would become available due to Plaintiff and others being forced to retire. (Kosciolek Dep. 69:10-70:16.) In fact, Makar was appointed Assistant Fire Chief by Mayor Leighton after Plaintiff was forced to retire. (Kosciolek Dep. 63:13.)

Plaintiff served as an Assistant Fire Chief until February 28, 2004, the effective date of his retirement. (Kosciolek Dep. 61:16-23; Letter from Thomas E. Kosciolek to Christine Jensen, Human Resource Director, City of Wilkes-Barre, dated February 27, 2004, Doc. 78-12, "Retirement Letter".) Up until Plaintiff's retirement, Plaintiff acted as and was paid as an Assistant Fire Chief. (Kosciolek Dep. 62:10-18.) Plaintiff chose to retire because his pension, which is calculated based upon his salary, would have been reduced had he been demoted to private. (Kosciolek Dep. 56:22-24; 78:18-80:2.) Plaintiff also retired, in part, to avoid the humiliation he would feel if he were relegated to the position of private. (Kosciolek Dep. 80:5-8.)

Plaintiff's employment as Assistant Fire Chief was governed by the Collective Bargaining Agreement ("CBA") between Local 104 and the City. (Doc. 78-13.) Plaintiff avers that, under the CBA, he can only be fired or demoted for "just cause." (See Article 27 of the CBA, Doc. 78-13 at 30.)

II. Procedural Background

On August 27, 2004, Plaintiff filed his Complaint (Doc. 1-1.) Plaintiff then filed an Amended Complaint on September 22, 2004. (Doc. 5.) Therein, Plaintiff alleged that Defendants deprived him of his constitutional rights[1] under color of state law, in violation of 42 U.S.C. §§ 1983, 1985 and 1986, by forcing him to retire (i.e., a "constructive discharge"). (Doc. 5 ¶¶ 6-23.) Plaintiff also asserted a claim against Local 104 for the breach of its duty, as his union, of fair representation. (Doc. 5 ¶¶ 24-25.) Lastly, Plaintiff claimed that the City breached multiple provisions of the CBA. (Doc. 5 ¶¶ 26-31.)

Local 104 and City Defendants each moved to dismiss Plaintiff's Amended Complaint. (Docs. 7, 11.) On August 9, 2005, the Court granted Defendants' motion as to Plaintiff's section 1985 and 1986 claims. (Doc. 42.)

1 1Plaintiff's Second Amended Complaint cites the First, Fourth and Fourteenth Amendments. (Doc.42 ¶ 1.) However, Plaintiff fails to specify how his First or Fourth Amendment rights were violated. Rather, Plaintiff focuses entirely on the lack of cause, or a hearing, for his alleged constructive discharge. Indeed, Plaintiff's Brief in Support of his Motion for Summary Judgment against City Defendants only addresses procedural due process. (Doc. 73 at 18.) As such, the Court construesPlaintiff's Second Amended Complaint as only claiming a violation of procedural due process. Even if Plaintiff did raise these claims in his Second Amended Complaint, because he ignored them at summary judgment, they are deemed waived. Scott v. Beard, Civil Action No. 3:02-CV-0691, 2006 WL 2645150, at *4 (M.D. Pa. Sept. 14, 2006).

City Defendants then filed a second motion to dismiss. (Doc. 43.) On August 16, 2005, the Court granted City Defendants' motion insofar as they sought dismissal of Plaintiff's claims against Mayor Leighton and Chief Lisman in their official capacities. (Doc. 49.)

On September 19, 2006, Plaintiff moved for summary judgment against both Local 104 and City Defendants. (Docs. 61, 64.) Thereafter, on September 20, 2006, Local 104 filed a Motion for Summary Judgment. (Doc. 71.) City Defendants then filed a Motion for Summary Judgment on October 2, 2006. (Docs. 76.)

These motions are fully briefed and ripe for disposition.

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party in entitled to a judgment as a matte of law." FED. R. CIV. P. 56(c). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicablesubstantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establishthat it is entitled to judgment as a matter of law. Where, however, there is a disputedissue of material fact, summary judgment is appropriate only if the factual dispute is not agenuine one. See id. at 248. An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." Id.

Where there is material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. See CHARLES ALAN WRIGHT & ARHTUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficientshowing of an essential element of her case." Celotex Corp. v. Catrett, 477 U.S. 317,323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolvedagainst the moving party, and the entire record must be examined in the light mostfavorable to the nonmoving party. See White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shiftsto the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. See Anderson, 477 U.S. at 256-257.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

DISCUSSION

I. Plaintiff's Procedural Due Process Claim

To establish a claim under section 1983 for deprivation of procedural due process, a plaintiff must prove that he was deprived of a property interest under the color of state law and the procedures available to him did not provide him with due process. Dykes v. Southeastern Pa. Transp. Auth., 68 F.3d. 1564, 1570 (3d Cir. 1995). Here, Plaintiff bases his procedural due to process claim upon his alleged constructive discharge.

Employee resignations and retirements are presumed to be voluntary. Lehany v. City of Pittsburgh, 183 F.3d 220, 228 (3d Cir. 1999) (citing Anagarita v. St. Louis County, 981 F.2d 1537, 1544 (8th Cir. 1992)). "This presumption remains intact until theemployee presents evidence to establish that the resignation or retirement was involuntarily procured." Id. "If an employee retires of his own free will, even though prompted to do so by some action of his employer, he is deemed to have relinquished his property interest in his continued employment for the government, and cannot contend that he was deprived of his due process rights." Id. (citing Hargray v. City of Hallandale, 57 F.3d 1560, 1567 (11th Cir. 1995); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 173 (4th Cir. 1988)).

Under Third Circuit jurisprudence, "a resignation will be deemed involuntary (i.e., deemed a constructive discharge) and will thus trigger the protections of the due process clause, and form the basis of a [section] 1983 due process claim, under only two circumstances: (1) when the employer forces the employee's resignation or retirement by coercion or duress, or (2) when the employer

obtains the resignation or retirement by deceiving or misrepresenting a material fact to the employee." Hill v. Borough of Kutztown, 455 F.3d 225, 233 n.10 (3d Cir. 2006) (citing Lehany, 183 F.3d at 228). To determine whether a retirement is involuntary, the Court must look at all of the circumstances surrounding Plaintiff's retirement. O'Connell v. County of Northampton, 79 F.Supp. 2d 529, 533 (E.D. Pa. 1999). The issue is whether Plaintiff reasonably believed that he "had no other choice but to quit." Lighton v. Univ. of Utah, 209 F.3d 1213, 1222 (10th Cir. 2000); see also Pa. State Police v. Suders, 542 U.S. 129, 134 (2004). "[T]he assessment [of] whether real alternatives were offered is gauged by an objective standard rather than by the employee's purely subjective evaluation; that the employee may perceive his only option to be resignation...is irrelevant." Stone, 855 F.2d at 174; see Christie v. United States, 518 F.2d 584, 587-88 (Ct. Cl. 1975). "[T]he mere fact that the choice is between two comparably unpleasant alternatives...does not itself establish that a resignation was induced by duress or coercion, hence was involuntary." Stone, 855 F.2d at 174. This is so because the fact remains that a plaintiff faced with uninviting alternatives still has a choice. Christie, 518 F.2d at 587-88.

Here, Plaintiff has made no allegations and has introduced no evidence that City Defendants deceived or misrepresented a material fact to him, inducing him to retire. Rather, Plaintiff claims only that his retirement was the product of coercion or duress.

In determining whether a retirement was involuntary due to coercion or duress, the Court id to consider the following factors (1) whether the employee was presented with an alternative to retirement; (2) whether the employee understood the nature of the choice

he was given; (3) whether the employee had a reasonable time to choose; (4) whether the employee was permitted to select the effective date of retirement; and (5) whether the employee had the advice of counsel. Hargray, 57 F.3d at 1568; Speziale v. Bethlehem Area Sch. Dist., 266 F. Supp. 2d 366, 372 (E.D. Pa. 2003); O'Connell, 79 F. Supp. 2d at 533. After analyzing these factors, the Court concludes that Plaintiff has failed to raise a genuine issue of material fact as to whether his retirement was the product of coercion or duress, and thus involuntarily procured. As such, the Court will grant summary judgment in Defendants' favor.

First, while Plaintiff argues that Defendants forced his hand, Plaintiff was presented with an alternative to retirement, albeit an unpleasant one – Plaintiff could have accepted a demotion from Assistant Fire Chief to private. Consequently, Plaintiff's retirement was voluntary. Ballentine v. Dep't of Justice, 884 F.2d 1399 (Fed. Cir. 1989) (Table)(per curiam), available at 1989 WL 90751 (retirement was voluntary where employee was presented with choice of either retiring or accepting a demotion) (citing Christie, 518 F.2d at 587); Filliben v. Dep't of Navy, 34 M.S.P.R. 31, 34 (1987) (choice between demotion and resignation does not render a resignation involuntary).[2]

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2 It appears that Plaintiff even possessed a third option – Plaintiff could have stood pat. Mayor Leighton did not appoint Plaintiff's replacement until July 22, 2004, nearly five months after Plaintiff's retirement. (Makar Dep. 65:7-10; City of Wilkes-Barre Office of the Mayor, Executive Order No. 47 of 2004, dated July 22, 2004, Doc 80-15.) As such, Plaintiff may have been able to remain as Assistant Fire Chief until that time. Plaintiff could have at least remained as an Assistant Fire Chief past the date of his retirement. Plaintiff could have waited for his demotion to private, a demotion he alleges was sure to come, and then prosecute a grievance with Local 140 under the CBA. However, Plaintiff decided against this option, instead choosing to preempt his allegedly impending demotion by retiring.

Second, Plaintiff understood the nature of the choice put to him. The record demonstrates that Plaintiff was keenly aware of his options, as well as their potential ramifications. Plaintiff knew that, if he chose to retire, he would do so at a higher pension because his pension would be based upon his Assistant Fire Chief's salary. Plaintiff also knew that, if he were ultimately demoted to the lower-paying position of private, his pension would be based upon the reduced level of pay. Plaintiff chose to retire in order to protect his higher pension. Consequently, the Court concludes that Plaintiff understood the nature of the choice put to him as well as the ramifications of his decision to retire.

Third, Plaintiff had a reasonable period of time in which to decide whether to retire. The Leighton Letter was dated November 26, 2003. Plaintiff's Retirement Letter was dated February 27, 2004. In addition, Plaintiff had heard rumors about Mayor Leighton's intent to shake up the Fire Department during the Spring of 2003. As such, Plaintiff had more than three months to consider his decision. While Plaintiff stated in his deposition that Chief Lisman pressured him to retire during their February conversation, with Lisman even offering to type up a letter of retirement for Plaintiff to sign, Plaintiff did not succumb to Lisman's pressure. Afterwards, Plaintiff even filed grievances with Local 104 and waited for their resolution. After receiving an answer from the City on February 19, 2004 that his grievance was without merit because he still occupied the position of Assistant Fire Chief, Plaintiff waited more than a week before submitting his Retirement Letter on February 27, 2004. Viewing all of these circumstances, the Court concludes that Plaintiff had a reasonable period of time in which to make an informed decision to retire.

Fourth, Plaintiff had control over the effective date of his retirement. There is no evidence in the record suggesting that Plaintiff was given a deadline tc make his decision. To be sure, Mayor Leighton did not appoint Plaintiff's replacement until July 22, 2004, nearly five months after Plaintiff's retirement. (Maker Dep. 65:7-10; City of Wilkes-Barre Office of the Mayor, Executive Order No. 47 of 2004, dated July 22, 2004, Doc. 87-6 at 24) As such, it appears that Plaintiff could have remained in his position as Assistant Fire Chief until that time. At the least, Plaintiff could have remained in his position as Assistant Fire Chief past February 28, 2004. waited for his allegedly impending demotion, and then challenged it through the union grievance procedure. Instead, Plaintiff chose to retire, effective February 28, 2004. As such, the Court concludes that Plaintiff controlled the effective date of his retirement.

Lastly, Plaintiff does not appear to have had the advice of counsel. However, Plaintiff has failed to present any evidence of how the advice of counsel would have altered his decision to retire. As such, this factor does not weigh in Plaintiff's favor. See Speziale, 266 F. Supp. 2d at 374.

Having fully addressed the five factor test set forth in Hargray and employed in O'Connell and Speziale, the Court concludes that there is no genuine issue of material fact as to whether Plaintiff's retirement was the product of coercion or duress on the part of Defendants. Even when viewing the evidence in the light most favorable to Plaintiff, the court finds that Plaintiff was presented with at least two options – accept a demotion to private or retire. "Resignations obtained in cases where an employee is faced with unpleasant alternatives are nevertheless voluntary because "the fact remains that plaintiff had a

choice." Hargray, 57 F.3d at 1568 (quoting Christie, 518 F.2d at 587). Here, Plaintiff has failed to present evidence that his choice between these two unpleasant alternatives was not, in fact, a choice. He has therefore failed to rebut the presumption that his retirement was voluntary. Defendants are thus entitled to summary judgment on Plaintiff's section 1983 constructive discharge claim.[3] Plaintiff's motions for summary judgment will be denied.

II. Plaintiff's State Law Claims

Whereas Plaintiff's now dismissed federal law claims were the bases for subject matter jurisdiction, the Court will decline to exercise supplemental jurisdiction over Plaintiff's state law claims against Local 104 for

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3 Because the Court concludes that Plaintiff voluntarily relinquished any property interest in his public employment, the Court need not address in depth the issue of whether the grievance procedures available to him provided him with due process of law. The Court notes that the United Sate Court of Appeals for the Third Circuit has repeatedly held that, "in cases in which 'a due process claim is raised against a public employer, and grievance and arbitration procedures are in place,...those procedures satisfy due process requirements.'" Leheny, 183 F.3d at 228. In the present case, Plaintiff's employment was governed by the CBA between Local 104 and the City. The CBA included a grievance procedure providing for successive appeals to higher levels within the Fire Department, then to the Mayor, and ultimately to an arbitrator. (Article 16 of the CBA, Doc. 87-14 at 17-18.) Such a process has been held to meet the requisite due process requirements in a public employment context. Jackson v. Temple Univ., 721 F.2d 931, 933 (3d Cir. 1983). (stating that right to proceed to arbitration satisfies due process even if earlier grievance hearing were inherently biased). Plaintiff did, in fact, file a grievance via those procedures, which was subsequently denied by Chief Lisman because Plaintiff had not yet been demoted. Plaintiff then abandoned his grievance, having not grieved to the Mayor, which was the next step in the CBA grievance procedure. Also, the CBA grievance procedure remained available to Plaintiff to challenge his demotion if and when he ultimately were demoted. However, Plaintiff chose to retire rather than stand pat, wait for the demotion he alleges was a foregone conclusion, and fight. Having not availed himself of the constitutionality adequate process that was available to him under the CBA, Plaintiff could not now complain that he was deprived of due process.

breach pf a union's duty of fair representation and breach of contract. 28 U.S.C. § 1367(c) (a federal district court may decline to exercise supplemental jurisdiction over state law claims when the court had dismissed all claims over which it has original jurisdiction); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating that "if the federal claims are dismissed before trial... the state claims should be dismissed as well"). Accordingly, the Court will dismiss Counts II and III of Plaintiff's Second Amended Complaint without prejudice.

CONCLUSION

For the above stated reasons, the Court will: (1) grant Defendants' motions for summary judgment as to Count I of Plaintiff's Amended Complaint; (2) dismiss Counts II and III of Plaintiff's Amended Complaint without prejudice; and (3) deny Plaintiff's motions for summary judgment.

An appropriate Order will follow.

December 18, 2006
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS E. KOSCIOLEK,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 3:04-CV-1920
v.	:	
	:	(JUDGE CAPUTO)
WILKES-BARRE	:	
FIRE FIGHTERS	:	
ASSOCIATION LOCLA 104,	:	
INTERNATIONAL	:	
ASSOCIATION OF	:	
FIRE FIGHTERS, AFL-CIO	:	
a/k/a LOCAL 104 OF THE	:	
INTERNATIONAL	:	
ASSOCAITION OF	:	
FIRE FIGHTERS,	:	
AFL-CIO-CLC and CITY OF	:	
WILKES-BARRE,	:	
	:	
Defendants,	:	
	:	

ORDER

NOW, this 18TH day of December, 2006, **IT IS HEREBY ORDERED** THAT:

(1) Defendants City of Wilkes-Barre, Thomas M. Leighton, Jacob Lisman, and Wilkes-Barre Fire Fighters Local 104, International Association of Fire Fighters, AFL-CIO's Motions for Summary Judgment (Docs. 71, 76) as to Count I of Plaintiff's Second Amended Complaint (Doc. 5) are **GRANTED**.

(2) Plaintiff's Motions for Partial Summary Judgment (Docs. 61, 64) are **DENIED**.

(3) Counts II and III of Plaintiff's Amended Complaint (Doc. 5) are **DISMISSED** without prejudice.

(4) The Clerk of the Court shall mark this case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge